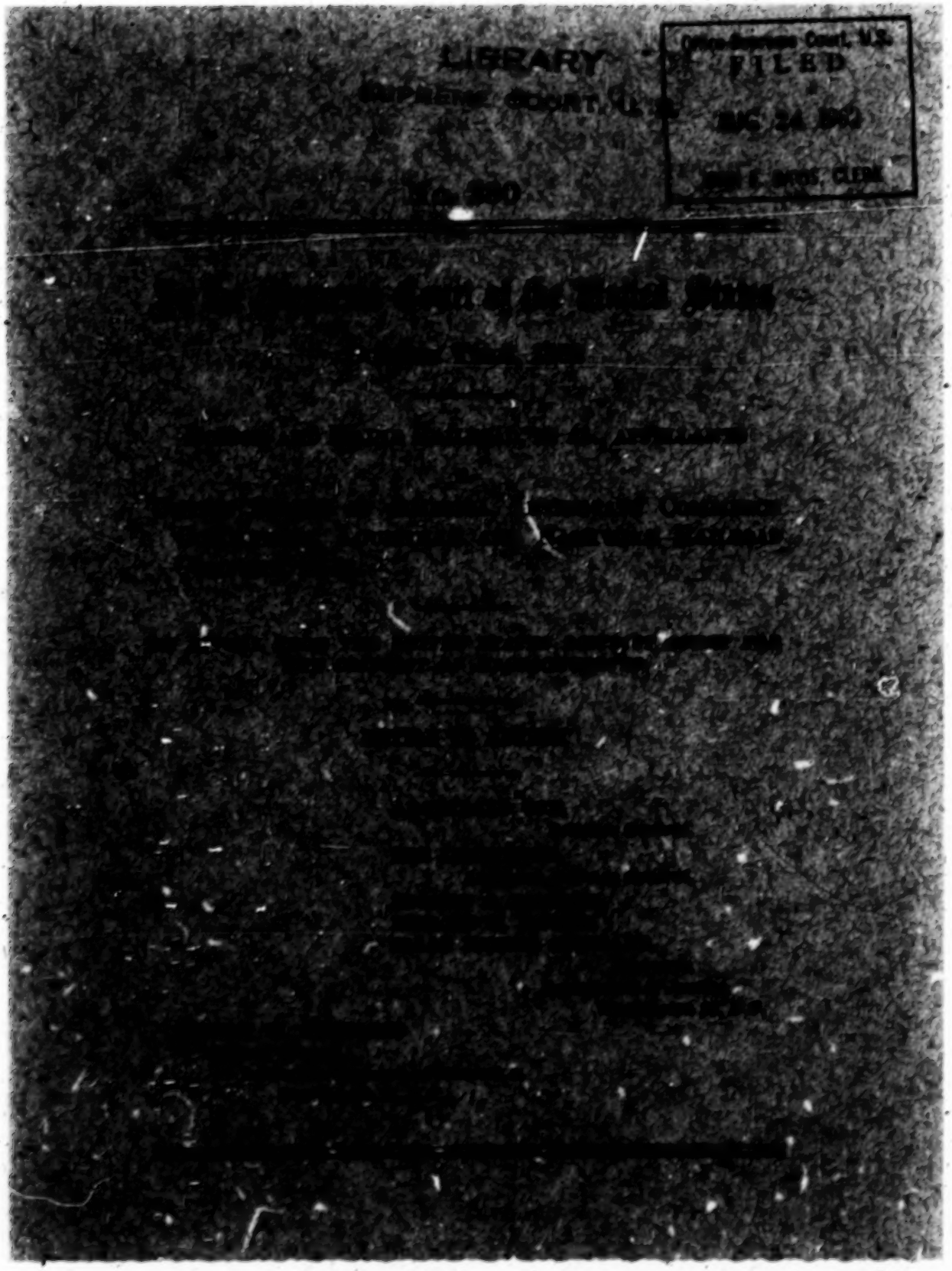
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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 230

BOSTON AND MAINE RAILROAD, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

Pursuant to paragraph 1(c) of Rule 16, of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a judgment (J.S.A. 29a) [1] of a three-judge district court which dismissed the complaint of the Boston and Maine Railroad and 46 other railroads and of the New York Central Rail-

[1] J.S. refers to the Jurisdictional Statement of appellants and J.S.A. refers to the appendices to such Statement.

road Company, an intervening plaintiff, seeking to set aside an order of the Interstate Commerce Commission. Pursuant to Section 15(6) of the Interstate Commerce Act (J.S. 3), the order prescribes a basis for the primary division of joint rates on traffic (except coal and coke made from coal) moving between points in the so-called "official" (northern) territory and "border points"—*i.e.*, points in a border zone between the "official" territory and the "southern" territory.[2]

The traffic involved in this case is limited to that moving from a border point over the lines of the Louisville and Nashville Railroad Co. ("L & N") or of the Atlantic Coast Line Railroad ("Coast Line") and then over the lines of one or more of the appellants to a destination in the North, or the converse. The issues here concern only a small segment of the carriers' traffic over a fractional part of their lines

---

[2] The lower court defined border points (J.S.A. 4a, fn. 6) as:

"Border points are generally those points on the dividing line between official and southern territory which for rate-making and rate-division purposes are deemed to be in official territory on traffic to and from the North, and in southern territory on traffic to and from the South. The border points involved here are the following * * *:

* * * *

Louisville, Ky.	Richmond to Petersburg, Va., inclusive
Evansville, Ind.	
Henderson, Ky.	Norfolk to Suffolk, Va., inclusive
Paducah, Ky.	
Cincinnati, Ohio, including Covington and Newport, Ky.	Bruce to Marford, Va., inclusive
	Jarratt, Va."

The court also summarized the geographical areas included in "official" territory and in "southern" territory (J.S.A. 3a, fn. 5).

(J.S.A. 56a). Thus, prior orders of the Commission have determined the division of joint rates on interterritorial traffic as well as traffic moving between such border points and the South. With the present order, the Commission has established a uniform basis for the division of joint rates on all interterritorial and border point traffic.

In 1953 the Commission in Docket No. 29885 (287 I.C.C. 497; 289 I.C.C. 4)[3] prescribed a basis for the division of joint rates charged for traffic carried between points in the official and southern territories. The percentages used in making the divisions were to be constructed from certain integers which were weighted for the terminal and interlining services supplied by the carriers. Thus, an integer of 12 was assigned for each 50 miles of line haul service, and an integer of 53, equivalent to 221 miles, was assigned for terminal services at the point of origin, destination or interchange (J.S.A. 5a, fn. 7).

After the 1953 order was entered, a dispute arose between the northern and southern railroads as to whether such rate division formula applied to traffic to and from border points (J.S.A. 4a–5a). In a supplemental report, issued March 5, 1956, 298 I.C.C. 83, the Commission interpreted its 1953 order as requiring application of the formula prescribed in Docket No. 29885 to rate divisions on border point traffic moving to and from the South. The Commission, however, did not consider the order determina-

[3] This proceeding was initiated upon a petition by northern railroads to reopen I.C.C. Docket No. 24160, *Divisions of Rates, Official and Southern Territorities*, 234 I.C.C. 175 (1939).

tive with respect to similar border point movements to and from the North (J.S.A. 4a–5a). The result was that "on traffic moving between border points and points in southern territory over an official territory line the 29885 divisions applied, whereas on similar traffic moving between border points and points in official territory over a southern line the divisions were made on a mileage prorate basis which gave southern carriers smaller divisions for comparable distances than were received by northern carriers" (J.S.A. 5a).

The southern carrier-appellees in the case at bar then filed the complaint herein,[1] seeking the application of the Docket No. 29885 integer basis of rate division to border point traffic on their lines moving to and from the North. The Commission granted the requested relief, thereby establishing a uniform basis for primary rate division on interterritorial traffic, including border point traffic, moving north or south over the lines of the southern carrier-appellees and the northern carrier-appellants. The district court sustained the Commission, ruling that its decision was in accordance with Section 15(6) of the Interstate Commerce Act and that its findings were supported by substantial evidence (J.S.A. 1a).

ARGUMENT

Underlying the contentions of the appellants are the assertions that of all of the several Section 15(6)

[1] In the meantime, the Commission granted the petition of the northern lines to reopen Docket No. 29885 for further hearing. This reopened proceeding is pending in the Commission (J.S.A. 24a).

standards, relative costs must be the primary or decisive factor in determining rate divisions, and that the Commission failed to give decisive weight to the alleged relatively higher system costs of the northern carriers as a group or of individual northern carrier systems. However, Section 15(6) plainly does not make relative costs either as between individual systems or groups of systems such a primary or decisive factor. On the contrary, system costs is but one of a number of factors which Section 15(6) prescribes for "due consideration" by the Commission in its determination of rate divisions. Since it is uncontroverted that the border traffic at issue here involves relatively short hauls and relatively high cost terminal services by the two southern carriers, factors which are sufficient under Section 15(6) to support the Commission's ruling, there is no substantial question warranting plenary consideration by this Court.

1. The district court and the Commission were clearly correct in holding that the decisions of this Court in *New England Divisions Case*, 261 U.S. 184, 195; *Baltimore and Ohio Railroad* v. *United States*, 298 U.S. 349, 359; *United States* v. *Abilene and Southern Railway Co.*, 265 U.S. 274; and *Alabama Great Southern Railroad Co.* v. *United States*, 340 U.S. 216, 223, dispose of the appellants' contention that their alleged relatively higher system costs must be afforded decisive or primary weight among the several factors set forth in Section 15(6). Section 15(6) provides a number of factors to be considered and weighed by the Commission. Included among

such factors is whether a carrier "is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, *without regard to the mileage haul*, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge." (Emphasis supplied.) Section 15(6) empowers and requires the Commission to make rate divisions "that colloquially may be said to be fair" (*Baltimore and Ohio Railroad, supra*, at 357). Even "[e]rror as to the weight to be given to financial needs, operating cost or other material facts is not a misconstruction of the Act" (*id.* at 359) or a ground for setting aside a Commission order (*New England Divisions Case, supra*, at 204). The weight and effect of the various factors and standards of Section 15(6) are for the Commission (*United States* v. *Abilene and Southern Railway Co., supra*, at 284). The appellants make no claim that the division of rates allocated to them is so low as to be confiscatory and the Commission properly found that comparisons of rates of return need not be controlling for this segment of the total traffic (J.S.A. 56a). This weighing of the various statutory factors is clearly within the authority of the Commission.

2. The uncontroverted facts are that for the border traffic here involved the L & N and Coast Line have relatively short hauls and incur relatively high cost terminal services (J.S.A. 55a–56a, 47a, 43a) and that in the period 1946 through 1955 the L & N and Coast Line have made relatively more costly improvements in their lines and in the terminals here involved (J.S.A. 15a–16a). These are factors clearly

within Section 15(6). Noting the relative length of the hauls, the district court observed (J.S.A. 14a):

> The L & N's average haul is 124 miles and that of the plaintiffs is 472 miles. On the Coast Line traffic the distances vary from 8 to 53 miles as compared with an average of 439 miles for the northern railroads. Thus the line hauls of the L & N and Coast Line are relatively short when compared with those of plaintiffs, and the present divisional basis gives too little consideration to the fact that freight rates cover terminal and interchange services as well as line-haul operations.

The Commission's findings as to the improvements made by the southern carriers in an effort to increase efficiency, as summarized by the district court, showed that (J.S.A. 15a–16a):

> During the period from 1946 through 1955 L & N and Coast Line expended very large sums for modern equipment and for other improvements on their lines which contributed to more efficient operations. By these and other means described on pages 499 and 501 of the Commission's report, L & N and Coast Line have in recent years improved their operations in relation to those of the plaintiffs, despite the fact that the principal plaintiffs enjoy a greater density of traffic on their lines which affords them greater opportunities for handling heavier trains with resulting economies.

The appellants conceded that the short haul and terminal expenses of the L & N and Coast Line were relatively heavy (J.S.A. 14a, fn. 16), and it cannot

be questioned that under Section 15(6) this factor plus the efforts to achieve more efficient operations provide a reasonable basis for rejecting a mileage or over-all system cost basis as the sole or critical standard for divisions of joint rates (see cases cited *supra*, p. 5, and *Beaumont, S.L. & W. Ry.* v. *United States*, 282 U.S. 74, 88; *Divisions of Rates, Official and Southern Territories, supra.*

3. The appellants' additional contentions, including the allegation that the Commission improperly used the Docket No. 29885 basis and the allegation that comparisons between the costs of the appellees and of individual appellants should have been given greater weight by the Commission, are further refinements of the appellants' basic but untenable contention that the Commission should have given primary and decisive weight to relative costs. They were properly rejected by the district court (J.S.A. 23a–24a).

With respect to appellants' contention that the Commission based its order upon its earlier conclusions in No. 29885 without evidence to sustain its assumption of similar circumstances, the court noted that the Commission had found that the record in No. 29885 "differed little in respect of border-point traffic from that before us here" and held the finding "supported by substantial evidence" (J.S.A. 23a). The court added that it was perfectly proper for the Commission to compare the records in the two dockets as all parties before the Commission in the instant case were also parties in No. 29885 and as the ap-

pellants themselves had introduced "a documentary history of the divisions of border-point rates prescribed in Docket Nos. 24160 *and* 29885" (J.S.A. 23a). The court stated further (J.S.A. 24a):

> The Commission's finding that border-point traffic to the North moves under similar circumstances as border-point traffic to the South is supported by substantial evidence. Joint rates on the latter traffic are being divided on the validly established 29885 basis of divisions.
>
> A validly established and currently applied basis of divisions of revenue derived from similar traffic moving in the same or adjacent territory under similar circumstances may properly be considered as a criterion, though not necessarily a controlling one, of the reasonableness of prescribing the same basis of divisions of the revenue here in issue. See *Youngstown Sheet & Tube Co.* v. *United States*, 1934, 295 U.S. 476, 480; see also *United States* v. *Northern Pacific Ry. Co.*, 1933, 288 U.S. 490, 500.

The court found that the Commission had given "careful consideration" to the "abundance of evidence relating to costs" which was contained in this "massive" record. It found further that the Commission's challenged conclusion that "the only comparable cost data for the complainants and the defendants are on the basis of territorial or system-wide averages, which are not determinative of the costs of these particular movements," was supported by substantial evidence (J.S.A. 21a). The court examined and found untenable the contention of the

New York Central that the L & N should have been required to show the actual cost of service by adjusting its cost and appellants' cost studies by means of data not available to the L & N (J.S.A. 22a). Appellants fail to present evidence to support their contention that the differences in the conditions as among the various northern carriers were such as to compel the Commission to make separate divisions of rates for each northern carrier. Indeed, the court found that the nature of the traffic and operating conditions of the northern railroads as a group was sufficiently typical to warrant adoption of the uniform basis for the division of joint rates (J.S.A. 26a). It also found no substance to the objection that the ultimate findings were not in the precise terms of the statute (J.S.A. 18a–19a), and this determination is clearly consistent with this Court's decision in *Beaumont, S.L. & W. Ry.* v. *United States, supra.*

The Commission properly selected, weighed and applied appropriate standards from and among those set forth in Section 15(6), and its determinations, supported by substantial evidence, present nothing for further review.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court below should be affirmed.

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IN THE

Supreme Court of the United States

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No. 230.

BOSTON AND MAINE RAILROAD ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.,
Appellees.

On Appeal From the United States District Court for the District of Massachusetts.

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